90-539

No. 90 –

In The

Supreme Court of the United States

October Term, 1990

CAROLYN SONNENBERG, GORDON SONNENBERG, MARY CARHOUN MCCORMICK, JEFF CARHOUN, SCOTT CARHOUN, GERRY CARROLL, KATHERINE CARROLL, KRISTOPHER CARROLL,

Plaintiffs and Petitioners,

vs.

UNITED STATES OF AMERICA,

Defendant and Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Has the time come to overrule *Feres v. United States*, 340 U.S. 145, 71 S.Ct. 153, 95 L.Ed. 152 (1950) because it created a judicial exception that Congress never intended, to the general waiver of sovereign immunity contained in the Federal Tort Claims Act?

The *Feres* doctrine, which bars tort recovery where a serviceman was injured while engaging in an activity incident to military service, was last before the Court in *United States v. Johnson*, 481 U.S. 681, 107 S.Ct. 2063, 96 L.Ed.2d 648 (1987). There, Justice Scalia, joined by three other justices, wrote a strong dissenting opinion which explained why *Feres* was decided incorrectly. The dissent stopped short of stating that *Feres* should be overruled because that relief had not been requested. In the present case, petitioners challenged the *Feres* doctrine throughout the proceedings below, and this issue is now directly presented. Justice Kennedy, who was not on the Court when *Johnson* was decided, concurred in opinions which were critical of *Feres*, and followed it only reluctantly, when he was on the Court of Appeals. See, *Troglia v. United States*, 602 F.2d 1334 (9th Cir. 1979) and *Veillette v. United States*, 615 F.2d 505 (9th Cir. 1980). The views on this issue of the justice appointed to replace Justice Brennan are unknown.

Overruling *Feres*, and returning the law to what it always should have been, would be particularly appropriate now. It would implement the view that the Court should construe statutes according to congressional intent, not the justices' visions of social policy.

QUESTIONS PRESENTED – Continued

2. In the alternative, petitioners submit the Court should grant certiorari to consider whether it is at least time to reevaluate the rationales of the *Feres* doctrine, so that recovery would only be precluded in more limited situations. The question presented here would then be whether the immunity created by *Feres* should apply when an off-duty serviceman is injured in an automobile accident, while returning to his base, after having gone on a military sponsored trip to a public entertainment park such as Disneyland. Numerous federal court decisions, including the present one, have interpreted and extended the *Feres* doctrine to bar such an action, on the basis that the recreational activity was only available to the serviceman because of his military status. The Court has never considered this kind of application of the *Feres* doctrine. Given the rationales most often advanced to support the doctrine, there is no reason that it should preclude recovery in such a situation.

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PETITION FOR WRIT OF CERTIORARI

STATUTORY PROVISIONS INVOLVED

This case involves the interpretation of various provisions of the Federal Tort Claims Act (28 USC §§ 1346, 2671-2680). In particular, it involves:

(1) 28 USC section 1346(b) which abolished the sovereign immunity of the United States. This statute allows a civil tort action for damages against the government

> . . . for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

(2) 28 USC section 2674, which similarly provides, in pertinent part:

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

(3) 28 USC section 2671, which contains definitions that refer to the military and states, in pertinent part:

> As used in this chapter and sections 1346(b) and 2401(b) of this title, the term "Federal agency" includes the executive departments, the judicial and legislative branches, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does not include any contractor with the United States.
>
> "Employee of the government" includes officers or employees of any federal agency, members of the military or naval forces of the United States, members of the National Guard while engaged in training or duty under section 316, 502, 503, 504, or 505 of title 32, and persons acting on behalf of a federal agency in an official

> capacity, temporarily or permanently in the service of the United States, whether with or without compensation.
>
> "Acting within the scope of his office or employment", in the case of a member of the military or naval forces of the United States or a member of the National Guard as defined in section 101(3) of title 32, means acting in the line of duty.

(4) 28 USC section 2680(j), which lists exceptions to tort liability and states, in pertinent part, that the United States is not liable for

> Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

DECISIONS BELOW

On February 5, 1988, the District Court issued findings of fact and conclusions of law, which determined that this wrongful death action was barred by *Feres v. United States, supra,* 340 U.S. 135. These findings and conclusions were entered on February 8, 1988. (Exhibit A.) On the same dates, the District Court filed and entered an order of dismissal. (Exhibit B.) On June 1, 1990, the United States Court of Appeals for the Ninth Circuit filed an unpublished memorandum opinion upholding the decision of the District Court. (Exhibit C.)

JURISDICTION AND TIMELINESS

The decision of the Ninth Circuit was filed June 1, 1990. Petitioners invoke this court's certiorari jurisdiction under 28 USC section 1254(1). The petition for certiorari was initially due on August 30, 1990. By order dated August 6, 1990, the time to file it was extended until October 1, 1990, by Justice Sandra Day O'Connor.

STATEMENT OF THE CASE

The pertinent facts are simple and fairly stated in the findings of the District Court and the opinion of the Court of Appeals. Certain members of the Armed Forces were temporarily stationed in Las Vegas, Nevada. During their off-duty time on a weekend, they went on a recreational trip to Disneyland in California, sponsored by the military. A bus and a van leased by the military were used to transport the servicemen. During the return trip, the van went off the road in a single car accident at approximately 12:30 a.m. It rolled, crashed, and burned. Three servicemen who were passengers in the van were killed. Their families brought the present wrongful death action against the United States under the Federal Tort Claims Act.

The District Court granted the plaintiffs' motion in limine to the effect that the accident would not have happened, but for the negligence of a government employee. It dismissed the action for lack of subject matter jurisdiction on the ground that under *Feres v. United States, supra,* 340 U.S. 135 and its progeny, the United States was immune from civil liability on these facts. The

District Court held that the *Feres* doctrine applied to bar recovery even though the servicemen were off-duty, and the accident occurred while they were returning to the military base after a recreational activity at Disneyland, which is open to the public.

On appeal, the servicemen's families argued that the *Feres* doctrine does not apply on these facts. They also preserved their record for review here, by contending that *Feres* should be overruled.

The Court of Appeals for the Ninth Circuit affirmed the order dismissing the action. As pertinent here, it followed its previous decisions in *Roush v. United States*, 752 F.2d 1460 (9th Cir. 1985) and *Bon v. United States*, 802 F.2d 1092 (9th Cir. 1986). *Roush* held that the *Feres* doctrine precludes the imposition of liability on the government for its negligence, if the plaintiff enjoyed the recreational benefit by virtue of his military status, and was subject to direct military control during the activity. *Bon* applied *Roush* to conclude that an off-duty servicewoman, who rented a canoe from the military special services for recreational purposes, could not recover for injuries she sustained in a collision with another service member whose rented motorboat struck the canoe.

Accordingly, two questions are presented by this petition. First, should this court recognize that *Feres* interpreted the Federal Tort Claims Act incorrectly and overrule it? Second, in the event the court does not overrule *Feres*, should it narrow the application of the *Feres* doctrine so that it does not apply to injuries negligently

caused by a government employee to an off-duty serviceman during a recreational trip that takes place off military premises, because this type of activity is not truly "incident to military service"?

REASONS FOR GRANTING CERTIORARI

I. THE *FERES* DOCTRINE, WHICH WAS JUDICIALLY CREATED BY THIS COURT, SHOULD BE OVERRULED AND THE LAW RETURNED TO WHAT CONGRESS INTENDED WHEN IT PASSED THE FEDERAL TORT CLAIMS ACT.

INTRODUCTION

Congress eliminated most of the sovereign immunity of the United States in 1946, when it passed the Federal Tort Claims Act (hereafter "FTCA", or "Act"). The Act requires the Government to pay money damages for:

> . . . injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 USC § 1346(b). See also, 28 USC § 2674.

In *Feres v. United States*, 340 U.S. 135, 71 S.Ct. 153, 95 L.Ed. 152 (1950), the Court provided three reasons that Congress might have used to justify writing a legislative decision to preclude many tort claims brought by servicemen against the Government. As Justice Scalia's dissent in *United States v. Johnson*, 481 U.S. 681, 107 S.Ct. 2063, 95

L.Ed.2d 648 (1987) succinctly pointed out, Congress not only failed to provide such a broad exemption, but quite explicitly limited the exceptions that it wanted to recognize, by enumerating them in section 2680. Justice Scalia's forceful opinion, in which three other justices joined, thus explained why *Feres* was decided incorrectly.

The plaintiff in *Johnson* had prevailed in the Court of Appeals, and did not request the Court to overrule *Feres*. She argued only that the doctrine should not be extended to bar her wrongful death action against the Government where her husband had been killed while he was on a Coast Guard rescue mission, as a result of the negligence of a non-military government employee. In the present case, petitioners challenged the continued validity of the *Feres* doctrine throughout the proceedings below. They now ask this Court to return the law to what it should have been, before *Feres* created an unwarranted judicial exception to the Act.

In what follows, we draw heavily on Justice Scalia's careful and detailed explanation of why *Feres* was incorrect. We also update, summarize, slightly expand, and therefore partly reorganize, those arguments. We are hopeful that there are now at least four justices on the Court who would like the opportunity to convince one or more of their colleagues that the dissent in *Johnson* was correct, and that *Feres* should either be overruled or significantly narrowed.[1]

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[1] In *Johnson*, the serviceman unquestionably was killed while he was performing duties incident to his military service.

(Continued on following page)

A. The Language Of The Federal Tort Claims Act Plainly And Unambiguously Provides For Suits By Members Of The Military Injured During Most Of Their Activities.

The language in 28 USC section 1346 (b) imposes civil tort liability on the United States for all persons injured by the negligence of a government employee. Section 2671 includes members of the military who are acting within the course and scope of their employment, as government employees, for whose conduct the United States is liable under the Act.

Section 2680 sets forth various exceptions to liability. It does not contain a general exclusion for actions brought by servicemen. Instead, section 2680(j) excludes "any claim arising out of the *combatant activities* of the military or naval forces, or the Coast Guard, *during time of war*." (Emphasis added.) Section 2680(b) excludes all military personnel injured in a foreign country.

The existence of these specific exceptions demonstrates that Congress considered the special requirements of the military, and provided the precise exceptions that it thought were needed.

(Continued from previous page)

The issue was whether *Feres* applied when the negligent government employee was not in the military. Therefore, the Court did not need to address limitations which might be appropriate on what activity is "incident to service" for the purpose of applying the *Feres* doctrine. That issue is presented here, and is discussed in section II, where petitioners suggest an alternative to the outright overruling of *Feres*.

The first decision of the Court interpreting the Act, *Brooks v. United States*, 337 U.S. 49, 93 L.Ed. 1200, 69 S.Ct. 918 (1949), specifically rejected the Government's argument that people enlisted in the military could never recover under the Act. It reasoned that in light of the Act's specific exceptions, it could not be inferred that Congress intended to bar all actions brought by injured servicemen. 337 U.S. at 51. Accordingly, *Brooks* concluded that off-duty servicemen who were injured in a collision with an Army truck could recover damages under the Act.

B. The *Feres* Doctrine That A Serviceman Cannot Recover For Injuries Which Arise Out Of, Or Are Sustained In The Course Of, Activity Incident To Military Service Has Been Strongly Criticized.

Feres was decided one year after *Brooks*. It held that servicemen cannot recover for injuries that "arise out of or are in the course of activity incident to service." 340 U.S. at 146. *Feres* gave three reasons for announcing this rule. First, there is no parallel civil liability on the part of a private person. At 141-142. Second, Congress could not have intended local tort law to govern the "distinctively federal" relationship between the Government and servicemen. At 142-144. Third, Congress could not have intended to make actions available to servicemen because they receive veterans' benefits as compensation for injuries suffered incident to service. At 144-145. Several years later, the Court added a fourth rationale: Congress could not have intended to permit tort actions for service-related injuries because this would unduly interfere with

military discipline. *United States v. Brown*, 348 U.S. 110, 112, 75 S.Ct. 141, 99 L.Ed. 139 (1954).

Feres has been applied to deny recovery in a wide variety of contexts that seem to have little, if anything, to do with the original intent of Congress when it passed the Act. As Justice Scalia's opinion in *Johnson* pointed out, the *Feres* doctrine has received almost universal criticism.[2] 481 U.S. at 701.

The expansion of *Feres* in *Johnson* has also been criticized extensively. See e.g., Riley, *United States v. Johnson*:

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[2] Citing *Sanchez v. United States*, 813 F.2d 593 (2d Cir. 1987); *Bozeman v. United States*, 780 F.2d 198, 200 (2d Cir. 1985); *Hinkie v. United States*, 715 F.2d 96, 97 (3d Cir. 1983), cert. denied, 465 U.S. 1023, 79 L.Ed.2d 680, 104 S.Ct. 1276 (1984); *Mondelli v. United States*, 711 F.2d 567, 569 (3d Cir. 1983), cert. denied, 465 U.S. 1021, 79 L.Ed.2d 677, 104 S.Ct. 1272 (1984); *Scales v. United States*, 685 F.2d 970, 974 (5th Cir. 1982), cert. denied, 460 U.S. 1082, 76 L.Ed.2d 344, 103 S.Ct. 1772 (1983); *LaBash v. United States Dept. of Army*, 668 F.2d 1153, 1156 (10th Cir.), cert. denied, 456 U.S. 1008, 73 L.Ed.2d 1303, 102 S.Ct. 2299 (1982); *Monaco v. United States*, 661 F.2d 129, 132 (9th Cir. 1981), cert denied, 456 U.S. 989, 73 L.Ed.2d 1284, 102 S.Ct. 2269 (1982); *Hunt v. United States*, 204 U.S. App. D.C. 308, 317, 636 F.2d 580, 589 (1980); *Veillette v. United States*, 615 F.2d 505, 506 (9th Cir. 1980); *Parker v. United States*, 611 F.2d 1007, 1011 (5th Cir. 1980); *Peluso v. United States*, 474 F.2d 605, 606 (3d Cir.), cert. denied, 414 U.S. 879, 38 L.Ed.2d 124, 94 S.Ct. 50 (1973).

Bennett, *The Feres Doctrine, Discipline, and the Weapons of War*, 29 St. Louis U.L.J. 383 (1985); Hitch, *The Federal Tort Claims Act and Military Personnel*, 8 Rutgers L. Rev. 316 (1954); Rhodes, *The Feres Doctrine After Twenty-Five Years*, 18 AFL Rev. 24 (Spring 1976); Note, 51 J. Air L. & Com. 1087 (1986); Note, 6 Cardozo L. Rev. 391 (1984); Note, 77 Mich. L.Rev. 1099 (1979); Note, 43 St. John's L. Rev. 455 (1969).

Expansion of the Feres Doctrine to Include Servicemembers' FTCA Suits Against Civilian Government Employees, 42 Vand. L. Rev. 233 (1989); Note: *Has the Feres Doctrine Become a Grant of Absolute Immunity?* 23 New Eng. L. Rev. 767 (1989); Cooley *Method to This Madness: Acknowledging the Legitimate Rationale Behind the Feres Doctrine* 68 B. U. L. Rev. 981 (1988); Note: *Feres Doctrine Gets New Life and Continues to Grow*, 38 Am. U. L. Rev. 185 (1988); Simmons, *Military Medical Malpractice*, 23 Ariz. B. J. 22 (1988); Gallagher, *Servicemembers' Rights Under the Feres Doctrine: Rethinking "Incident to Service" Analysis*, 33 Vill. L. Rev. 175 (1988); Kenworthy, *The Feres Doctrine: Should it Bar Claims by Military Personnel Against Civilian Federal Employees?* 15 N. Ky. L. Rev. 559 (1988).

The Courts of Appeals have continued to apply the *Feres* Doctrine only because they are obliged to do so. See *Appelhans v. United States*, 877 F.2d 309, 313 (4th Cir. 1989) ["the fact that the doctrine may in many cases lead to undeniably harsh results does not relieve this court of its obligation to apply precedent"]; *Loughney v. United States*, 839 F.2d 186, 187 (3d Cir. 1988) ["We are sympathetic to Loughney's legal arguments, and we are distressed by the tragic circumstances that gave rise to her suit. We do not, however, write on a clean slate."].

C. None Of The Reasoning Advanced To Support The *Feres* Doctrine Justifies Its Broad Exception To Tort Liability.

The first reason advanced in *Feres* for the exception it created was that there is no "parallel private liability". This is the only justification which even purports to have a basis in the actual language of the Act. The argument is that the Act imposes liability on the United States "in the same manner and to the same extent as a private individual under like circumstances." 28 USC § 2674. No "private individual" can raise a military force, and no State has consented to suits by members of its militia. Accordingly, section 2674 shields the Government from liability to servicemen who suffer injuries in the course of activity incident to service. 340 U.S. at 141-142.

The primary flaw in this reasoning is that it renders many of the Act's specific exceptions superfluous. Private individuals do not typically transmit postal matter (§ 2680(b), collect taxes or customs duties (§ 2680(c)), impose quarantines (§ 2680(f)), or regulate the monetary system (§ 2680(i)).

The Court eventually rejected the "parallel private liability" rationale of *Feres*. See *Rayonier, Inc. v. United States*, 352 U.S. 315, 319, 77 S.Ct 374, 1 L.Ed.2d 354 (1957); *Indian Towing Co. v. United States*, 350 U.S. 61, 66-69, 76 S.Ct. 122, 100 L.Ed. 48 (1955). Moreover, when the Court expanded the reach of the *Feres* doctrine in *United States v. Johnson, supra*, it did not resurrect this textual argument to justify the doctrine. 481 U.S. at 686-691.

As Justice Scalia opined, without textual support in the Act itself, to which *Feres* pointed as the embodiment

of Congressional intent on which its other rationales were based, the Court might not have reached the conclusion which it did in *Feres*. 481 U.S. at 695. Perhaps the present case is an appropriate one in which to hold that without any textual support in the Act itself, the Court should not have speculated about what Congress must have intended.

The doctrine cannot be sustained by the other rationales used to defend it either.

The first of them, *Feres'* second rationale, is as follows: Liability under the Act depends on "the law of the place where the [negligent] act or omission occurred". 28 USC § 1346(b). Congress could not have intended for local, and therefore geographically diverse, tort law to control important aspects of the "distinctively federal" relationship between the United States and military personnel. 340 U.S. at 142-144.

The Court rejected this rationale in *United States v. Shearer*, 473 U.S. 52, 58, n. 4, 105 S.Ct. 3039, 87 L.Ed.2d 38 (1985). When the Court revived this rationale in *Johnson*, it ignored *Shearer*. 481 U.S. at 688-689. Instead, it cited its earlier decision in *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666, 671-673, 97 S.Ct. 2054, 52 L.Ed.2d 665 (1977). In fact, the Court was correct to reject this rationale in *Shearer*, and should do so again, for the following reasons.

The primary concern expressed in *Feres* was that it would be unfair to the *soldier* to make his recovery turn on where he was injured because this was outside of his control. 340 U.S. at 142-143. Yet, as the Court subsequently pointed out in another context, nonuniform

recovery cannot be worse than uniform nonrecovery. See *United States v. Muniz*, 374 U.S. 150, 162, 83 S.Ct. 1850, 10 L.Ed.2d 805 (1963). Moreover, a serviceman injured by a negligent *civilian* must resort to state tort law. There is nothing inherently unfair about a rule that also requires a serviceman injured by a negligent government employee to do so.

Stencel had emphasized the *military's* need for uniformity in the standards governing it. 431 U.S. at 671. The rationale should be unpersuasive on this basis because several of the Act's exemptions show that Congress considered the uniformity problem. See, e.g., 28 USC §§ 2680(b), 2680(i), 2680(k). Yet Congress chose to retain sovereign immunity for only some claims affecting the military. § 2680(j).

Moreover, the Court effectively disavowed any "uniformity" justification – and rendered its benefits to military planning illusory – by permitting: (1) servicemen to recover against the government for injuries incurred in activity not incident to their military service, and (2) civilians to recover for injuries caused by military negligence. See e.g., *Indian Towing Co. v. United States, supra,* 350 U.S. 61 at 675.

Finally, there is no reason to conclude that uniformity is indispensable for the military alone, but not for the many other federal departments and agencies that can be sued under the Act for the negligent performance of their "unique, nationwide functions". *Stencel Aero Engineering Corp. v. United States, supra,* 431 U.S. at 675 (Marshall, J., dissenting). Furthermore, as has been noted, liability based on negligence of the federal prison system can be

imposed under varying state laws. *United States v. Muniz, supra,* 374 U.S. 150.

The third rationale of *Feres* was based on the fact that servicemen receive veteran's benefits if they are injured incident to service. Therefore, Congress could not have intended an additional recovery. *Shearer* also rejected this rationale. 473 U.S. at 58. In resurrecting it in *Johnson*, the Court again ignored *Scherer* and relied on its earlier decision in *Stencel*. In fact, the Court was correct to reject this rationale in *Shearer*, and should do so again, for the following reasons.

Servicemen injured or killed in the line of duty are compensated under the Veterans' Benefits Act (VBA), 72 Stat. 1118, as amended, 38 USC § 301 et seq. (1982 ed. and Supp.III). *Feres* described the absence of any provision to adjust dual recoveries under the Act and VBA as "persuasive [evidence] that there was no awareness that the Act might be interpreted to permit recovery for injuries incident to military service." 340 U.S. at 144.

The credibility of this rationale is undermined by the fact that the Court has permitted some injured servicemen to recover under the Act, even where they are compensated under the VBA. See, e.g., *Brooks v. United States, supra,* 337 U.S. at 53 which stated "nothing in the Tort Claims Act or the veterans' laws . . . provides for exclusiveness of remedy". The Court refused to call either remedy exclusive, when Congress had not done so. It even noted that Congress had included three exclusivity provisions in the Act, 28 USC §§ 2672, 2676, 2679, but had said nothing about servicemen plaintiffs. *Ibid.*

The correct approach is contained in *Brooks'* statement that VBA compensation should be taken into account, in adjusting recovery under the Act. 337 U.S. at 53-54. Indeed, making the VBA the exclusive recovery for service-connected injuries cannot be reconciled with the text of the VBA because it compensates servicemen without regard to whether their injuries occurred "incident to service", as *Feres* defined that term. See 38 USC § 105.

Moreover, the VBA is not, as *Feres* assumed, identical to federal and state workers' compensation statutes, which almost invariably contain exclusivity provisions. See e.g., 5 USC § 8116(c). Recovery is possible under workers' compensation statutes more often than under the VBA, and VBA benefits can be terminated more easily than can workers' compensation. See Note, *From Feres to Stencel: Should Military Personnel Have Access to FTCA Recovery?*, 77 Mich.L.Rev. 1099, 1106-1108 (1979). The presence of an alternative compensation system neither explains nor justifies the *Feres* doctrine; it only makes the effect of the doctrine more palatable. See *Hunt v. United States, supra,* 204 U.S.App.D.C. at 326; 636 F.2d at 598.

The foregoing three rationales were the only ones actually relied on in *Feres*. Given their weakness, it is hardly surprising that the "military discipline" rationale first stated in *United States v. Brown, supra,* 348 U.S. at 112, has often been cited as the "best" explanation for the doctrine. See *United States v. Shearer, supra,* 473 U.S. at 57, *Chappell v. Wallace,* 462 U.S. 296, 299, 103 S.Ct. 2362, 76 L.Ed.2d 586 (1983); *United States v. Muniz, supra,* 374 U.S. 150 at 162. The argument is that permitting recovery under the Act would undermine military discipline

because civilian courts would then be second-guessing military decision making. See *Stencel Aero Engineering Corp. v. United States, supra,* 431 U.S. at 671-672, 673.

The Court might justifiably have taken this problem into account, if it were interpreting an ambiguous statute. The effect on military discipline is not so certain, or so certainly substantial, that the Court was justified holding Congress did not mean what it plainly said in the Act.[3]

Congress, which expressly excluded recovery for combat injuries, did not recognize this rationale. *Feres* did not suggest it, either. Accordingly, the most reasonable inference is that the likely effect of tort actions upon military discipline is speculative, uncertain, and amorphous. See Bennett, *The Feres Doctrine, Discipline, and the Weapons of War, supra,* 29 St. Louis U.L.J. at 407-411.

Contrary to the assumption made in *Stencel,* Congress might have believed that the Act's explicit exclusions would bar the actions most threatening to military discipline, such as claims based upon combat command decisions, § 2680(j); claims arising in foreign countries, § 2680(k); intentional torts, § 2680(h) and claims based upon performance of "discretionary" functions, § 2680(a). Perhaps Congress thought that military decision making

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[3] As discussed in Section II, the "effect on military discipline" test became the preferred method of analysis in the Ninth Circuit Court of Appeals. See *Johnson v. United States* (9th Cir. 1983) 704 F.2d 1431, 1436. Yet it has been applied to bar actions involving recreational activities that had little, if anything, to do with second-guessing military decision-making and discipline.

was unlikely to be affected significantly because the Act imposes monetary liability on the Government, not on individual employees. It is *barring* recovery for injuries to servicemen that might adversely affect military discipline.

In sum, there is no valid reason to retain the judicial exception to the Act created in *Feres*. The "widespread, almost universal criticism" *Feres* has received is justified. See *In re "Agent Orange" Product Liability Litigation*, 580 F.Supp. 1242, 1246 (E.D.N.Y.), appeal dismissed, 745 F.2d 161 (2d Cir. 1984).

D. The Fact That Congress Has Not Amended The Act To Overturn *Feres* Does Not Establish That The Court Interpreted Congressional Intent Correctly.

The majority in *Johnson* noted that Congress has not acted to amend the Act, nor to overturn *Feres*. 481 U.S. at 688-689, n.9. As Justice Scalia's opinion pointed out, the unlegislated desires of later Congresses with regard to one thread in the fabric of the Act does not have any bearing on the proper interpretation of the entire fabric of compromises that their predecessors enacted into law in 1946. Even if they could have a bearing, intuiting those desires from a congressional *failure* to act is an uncertain enterprise. Not all of the desires of a majority of Congress find their way into law. 481 U.S. at 702-703. See also *Boys Market, Inc. v. Retail Clerks Union, Local 770*, 398 U.S. 235, 240-242, 90 S.Ct. 1583, 26 L.Ed.2d 199 (1970) [prior decision interpreting a section of the Norris-La Guardia Act overruled, notwithstanding Congressional inaction].

II. ALTERNATIVELY, THE *FERES* DOCTRINE SHOULD BE LIMITED SO THAT IT DOES NOT BAR ALL CIVIL ACTIONS ARISING OUT OF NEGLIGENCE OF A GOVERNMENT EMPLOYEE DURING MILITARY SPONSORED RECREATIONAL ACTIVITIES.

The issue in *United States v. Johnson, supra,* was whether the *Feres* doctrine should be extended to bar a civil action against the government based on the negligence of a non-military employee which killed a serviceman. The dissent would have limited " . . . our clearly wrong decision in *Feres* and confine[d] the unfairness and irrationality that decision has bred." 481 U.S. at 703. If a majority of the Court is unwilling to overrule *Feres,* the present case is an appropriate one in which to limit the "unfairness and irrationality" that the doctrine continues to breed. Indeed, the decision in *United States v. Johnson* has broadened that unfairness and irrationality, in the following manner.

Feres precluded an action based on medical malpractice. In *United States v. Shearer, supra,* 473 U.S. 52 the Court narrowed the *Feres* doctrine by focusing on the extent to which the action would interfere with military discipline. Accordingly, the Ninth Circuit responded to this development in *Johnson v. United States, supra,* 704 F.2d 1431, by evaluating four factors to determine whether *Feres* would bar a particular action. Those factors are: 1) where the negligent act occurred; 2) the duty status of the serviceman when he was injured; 3) whether the activity during which the serviceman was injured was only available to him because of his military service; 4) whether the nature of the plaintiff's activities at the time the negligent act

occurred are of the sort that could harm the military disciplinary system, if litigated in a civil action. At 1436-1439.

The Ninth Circuit applied this analysis where a serviceman sustained injuries in an automobile accident which occurred during return to his quarters following an after hours party at an officer's club on the base. It held that the action was not barred. At 1436-1441.

If the Ninth Circuit's analysis, or a similar approach, were applied to cases involving recreational activities, some actions would be barred and some would not, depending on the particular circumstances. For instance, an injury during an official sports competition on the base would probably be barred. By contrast, the present lawsuit would be allowed.[4]

Even the Ninth Circuit's four factor analysis is now itself in doubt. For instance, that court originally applied its approach in *Atkinson v. United States*, 804 F.2d 561 (9th Cir. 1986) to hold that a servicewoman on active duty, who received negligent prenatal care at a military hospital could bring a medical malpractice action under the act. The Ninth Circuit's approach was derailed when the Court decided *United States v. Johnson, supra*, 481 U.S. 681, which breathed new life into the old *Feres* rationales. The Ninth Circuit then granted rehearing in *Atkinson*, and

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[4] Petitioners explained at length in the District Court why application of the Ninth Circuit's analysis should allow the present action. If certiorari is granted, petitioners will address the specifics of what rule the Court should articulate to guide lower courts in resolving these issues.

held that it could no longer apply its four factor analysis. It was compelled to hold that the medical malpractice action was barred. *Atkinson v. United States*, 825 F.2d 202 (9th Cir. 1987).

In the present case, the Ninth Circuit simply relied on its earlier decisions involving recreational activities. It did not apply its four part analysis to determine whether the present action was barred.[5]

Petitioners submit that certiorari should be granted to address these problems. If the *Feres* doctrine must survive, its rationales should be articulated in a manner that does not preclude lawsuits against the government for injuries that were negligently caused during recreational, or other activity that has very little connection with military service.

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[5] By relying on its previous decisions in the recreational area, *Roush* and *Bon*, the Ninth Circuit demonstrated the additional confusion which has arisen in this area. *Roush* had reversed and remanded a judgment in the government's favor for further consideration. *Bon* precluded the plaintiff's action. Each decision, however, made the four-part analysis discussed above. In light of this court's decision in *United States v. Johnson*, that approach itself appears to be precluded.

CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that certiorari be granted.

Respectfully submitted,

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APPENDIX A

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UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

CAROLYN SONNENBERG, et al., Petitioner,	)	No. CV 85-4537-JSL(Px)
v.	)	FINDINGS OF FACT AND CONCLUSIONS OF LAW
UNITED STATES OF AMERICA, Respondent.	)	

FINDINGS OF FACT

1. In July, 1979, permanent team personnel for the Electronic Warfare Close Air Support (EWCAS) joint test arrived at Nellis Air Force Base, Las Vegas, Nevada. Deposition of Major Ronald Weninger (Weninger) 4:8-5:2.

2. Deputy Test Director for the joint test of electronic warfare during close air support was Col. Edward H. Roberts. Deposition of Col. Roberts (Robert) 7:17-20

3. The primary test period was August, 1981 to November, 1981. Weninger 5:2-25.

4. Marine, Air Force and Army personnel were used at various points to test the effectiveness of penetrating defenses, using aircraft or helicopters. Weninger 6:3-8.

5. Major Weninger was in charge of acquiring the resources and personnel outside of normal staff members that were needed to conduct the test. Weninger 6:11-17.

6. Once a need was identified, it was Major Weninger's responsibility to identify personnel for all three services and bring them to Nellis for temporary duty (TDY). A TDY person is one with official orders who is brought from his home station or post or base to perform a specific duty to another location. Weninger 9:24-10:1.

7. Major Weninger monitored the headquarters operation that took care of the TDY personnel, fed them, clothed them, took care of disciplinary problems, etc. Weninger 6:18-7:9.

8. TDY personnel assigned to EWCAS were not permitted to bring family with them. Weninger 9:20-22; 19:11-20.

9. TDY personnel were not permitted to bring private transportation. They were provided with housing, transportation, and additional funds. Weninger 10:24-25.

10. TDY personnel were allowed to leave the base evenings or weekends if their duty schedules permitted it. Weninger 12:25-13:2.

11. There are more restrictions on the behavior of TDY personnel than on active duty personnel who are at their regular duty station. Weninger 37:21-38:7.

12. Vehicles either owned or leased by the military were used to transport personnel during official functions for the test program. Weninger 15:16-23.

13. Recreational activities for TDY personnel were organized, both on and off base. There was a picnic and softball game, and a trip to Hoover Dam. Weninger 16:14-16; Roberts 32:23-33:9.

14. Military drivers, also TDY, were brought in to drive the buses. Weninger 17:24-18:1.

15. In October of 1981, a recreational trip to Disneyland was organized. It was officially approved by Col. Roberts. Roberts 24:12-20.

16. The trip to Disneyland was announced in formation. Deposition of Sgt. Mark Eggleston (Eggleston), 16:16-24.

17. There was a sign-up sheet for the trip to Disneyland in the orderly room. Eggleston 31:19-32:2.

18. There was no charge for transportation from Nellis to Disneyland and back. Eggleston 39:10-22.

19. Discount admission coupons to Disneyland were provided to those who signed up for the trip. Eggleston 17:4-6.

20. Only military personnel went on the trip. Eggleston 39:23-40:3.

21. A bus and a six passenger van were used to transport the EWCAS personnel on a recreational trip to Disneyland on October 31, 1981. The bus was driven by a military driver. Eggleston 17:11-12.

22. On the morning in question, when the EWCAS personnel arrived at Disneyland, they got into formation. Eggleston 41:22-24. Standard operating procedure for formation is that there would be a head count and any appropriate orders would be given. Weninger 25:3-10.

23. There was another formation before leaving Disneyland. Eggleston 41:25 through 42:3.

24. The purpose of the trip to Disneyland was to enhance the morale and welfare of the troops. Weninger 32:5-13 and 34:18-25; Robert 44:21-25, 45:7. Such functions are authorized under military regulations, such as AF Regulation 215-21, 4-4. The use of military vehicles for recreational purposes is also authorized. *See* DOD 4500.36 R 2-4 a and e, 5-9 and Chapter 1, AR 58-1.25.

25. The morale, welfare and recreation of the troops are an important part of the military mission. Most military bases have an office or officer who is charged with providing for the moral [sic], welfare, and recreation of the troops. Weninger 38:14-18. Specific regulations for each service and/or DOD provide for MWR activities or facilities. Weninger 38:19-23. *See* for example, DOD 4500. 36 R 5-9, AF Reg 215-21.

26. Private First Class Aaron Carhoun, Specialist Kris Carroll, Sergeant Frederick Sonnenberg, Sergeant Mark Eggleston, Sergeant Barnett, and Specialist Robert Nagy were all TDY personnel assigned to Nellis AFB for

the EWCAS joint test. All signed up for the trip, and rode on the bus from Nellis to Disneyland. They were on the bus for the return trip when a senior non-commanding officer (NCO) asked Sgt. Barnett to drive a van back to the base. Eggleston 18:1-6.

27. The van, leased by EWCAS for the duration of the test, had been used to provide additional transportation to Disneyland, apparently for senior NCOs. Eggleston 17:23-25.

28. Sgt. Barnett invited his friends to ride in the van with him, and they accepted. Eggleston 19:12-15.

29. When the van left Disneyland, Sgt. Barnett was driving. Eggleston 20:6-8.

30. At approximately 12:30 a.m. the van went off the road, rolled, crashed and burned. Sgt. Barnett, PFC Carhoun, Spec. Carroll, and Sgt. Sonnenberg were killed. Spec. Nagy and Sgt. Eggleston escaped the burning van, but were unable to rescue their friends. Eggleston 29:16-25-30:1-14.

31. At the time of their deaths, plaintiffs' decedents were engaged in a military-sponsored recreational activity which was a benefit accruing to them solely because of their military status.

32. The injuries suffered by plaintiffs' decedents arose out of and were sustained in the course of an activity incident to their military service.

33. Plaintiffs received and/or continue to receive the statutory payments due to survivors of servicemen who are killed in the line of duty.

34. Prosecution of this claim would require inquiry into the propriety of military decisions, and would impact upon military discipline. This case involves precisely the kind of judicial interference into military affairs which *Feres* seeks to avoid.

35. This action was filed pursuant to the Federal Tort Claims Act, 28 U.S.C. § 2671 et seq.

36. Any conclusion of law which is subsequently deemed to be a finding of fact is incorporated herein and shall be treated as a finding of fact.

CONCLUSIONS OF LAW

1. The passage of the Federal Tort Claims Act constituted a limited waiver of sovereign immunity. *United States v. Sherwood*, 312 U.S. 584, 61 S.G. 767, 85 L.Ed 2d 1058 (941).

2. Congress, on granting a waiver of sovereign immunity, may define the exact condition of such waiver, and any waiver of immunity must be strictly construed by the courts. *Honda v. Clark*, 386 U.S. 484, 501, 87 S.G. 1188, 18 L. Ed.2d 244 (1967); *United States v. Sherwood, supra.*

3. Recovery under the Federal Tort Claims Act by or on behalf of servicemen who sustained injuries which arise out of or are in the course of activity incident to service is barred for lack of subject matter jurisdiction. *Feres v. United States*, 340 U.S. 135, 95 L.Ed. 152, 71 S. Ct. 153 (1950).

4. "Where an acitivity [sic] is provided directly by the military or where there is substantial involvement by

the Armed Forces in the activity, such will be deemed incident to military service even though not essential to the mission of the military." *Woodside v. United States*, 606 F.2d 134, 142 (6th Cir. 1979).

5. Where plaintiffs or their decedents had access to various recreational benefits only because of their status as military personnel, injuries sustained during those recreational activities were incident to service because plaintiffs or their decedents would not have been privileged to take advantage of the benefits but for their military status. See *Johnson v. United States*, 704 F.2d 1431, 1438-1439 (9th Cir. 1983).

6. The application of the *Feres* doctrine is not limited only to situations in which interference with military discipline is threatened. See *Uptegrove v. United States*, 600 F.2d 1248, 1250 (9th Cir. 1979). *United States v. Johnson*, 481 U.S. ___, 95 L.Ed. 2d 648, 107 S.C. ___ (1987).

7. The *Feres* doctrine can be applied to bar a claim, even if the serviceman was on leave at the time of the injury. See *Charland v. United States*, 615 F.2d 508 (9th Cir. 1980).

8. Recreational activities sponsored by the armed services are activities incident to military service; tort claims for injuries incurred during participation in such recreational activities are therefore barred by the *Feres* doctrine.

9. "Even if military negligence is not specifically alleged in a tort action, a suit based upon service-related activity necessarily implicates the military judgments

and decisions that are inextricably intertwined with the conduct of the military mission." *United States v. Johnson*, 95 L.Ed. 2d at 659.

10. Even if the military discipline rationale did not support application of the *Feres* doctrine in this case, the first two rationales of *Feres* would support its application, as in *Atkinson v. United States*, 825 F.2d 202, 206 (9th Cir. 1987).

11. This action is barred by the doctrine of *Feres v. United States*, 340 U.S. 135, 71 S.G. 153, 95 L.Ed.2d 152 (1950). The action should be and hereby is dismissed for lack of subject matter jurisdiction.

12. Any finding of fact which is subsequently deemed to be a conclusion of law is incorporated herein and shall be treated as a conclusion of law.

J. SPENCER LETTS
United States District Judge.

Feb 5, 1988

Submitted by:

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APPENDIX B

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UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

CAROLYN SONNENBERG, et al., Petitioner, v. UNITED STATES OF AMERICA, Respondent.	No. CV 85-4537-JSL(Px) ORDER OF DISMISSAL

The motion in limine of plaintiffs that the doctrine of *res ipsa loquitur* applies, and the motion of defendant United Sates [sic] of America to dismiss for lack of subject matter jurisdiction having come on regularly for hearing before the Honorable J. Spencer Letts, United States District Judge, on the 7th day of December, 1987, plaintiffs appearing through their attorney Steven J. Weinberg, and defendant appearing through its attorneys, Robert C. Bonner, United States Attorney, Frederick M. Brosio, Jr., Assistant United States Attorney, Chief, Civil Division, by

Jimmye S. Warren, Assistant United States Attorney, and the Court having considered the pleadings herein, memoranda submitted and the exhibits thereto, lodged depositions, and oral argument of counsel; and in accordance with the "Findings of Fact and Conclusions of Law filed herewith,

IT IS ORDERED that plaintiffs' motion *in limine* that the doctrine of *res ipsa loquitur* applies is granted.

IT IS FURTHER ORDERED that defendant's motion to dismiss for lack of subject matter jurisdiction is granted;

The action is dismissed with prejudice.

DATED: This 5th day of February 1988.

/s/ J. Spencer Letts
United States District Judge

Submitted by:

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APPENDIX C

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CAROLYN SONNENBERG; GORDON SONNENBERG; MARY CARHOUN MCCORMICK; JEFF CARHOUN; SCOTT CARHOUN; GERRY CARROLL; KATHERINE CARROLL; KRISTOPHER CARROLL,	)	No. 88-5771
Plaintiffs-Appellants,	)	D.C. No. CV-85-4537-JSL
v.	)	MEMO-RANDUM*
UNITED STATES OF AMERICA,	)	Filed June 1, 1990
Defendant-Appellee.	)	

Appeal from the United States District Court
for the Central District of California
J. Spencer Letts, District Judge, Presiding

Argued and Submitted May 8, 1990
Pasadena, California

Before: REINHARDT, LEAVY, and RYMER, Circuit Judges.

Four members of the armed forces were killed in a vehicle accident on a public highway. The decedents were returning from a recreational trip during their off-duty time. Survivors of the service members (collectively "The

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Sonnenbergs") filed this wrongful death action under the Federal Tort Claims Act. The district court dismissed for lack of jurisdiction under *Feres v. United States*, 340 U.S. 135, 146 (1950), where the Supreme Court held that the Government is not liable for injuries to service members when the injuries occur in the course of activity incident to service.

STANDARD OF REVIEW

We review de novo the question of whether the *Feres* doctrine is applicable to the facts. *McGowan v. Scoggins*, 890 F.2d 128, 129 (9th Cir. 1989). We review for clear error the findings of fact of the district court. *Kruso v. International Telephone and Telegraph Corp.*, 872 F.2d 1416, 1421 (9th Cir. 1989).

DISCUSSION

I. Factual Disputes

1. Trip Organized by the Military

The Sonnenbergs contend that the Disneyland trip was private in nature because is was not organized by the special services unit of Nellis Base. It is clear, however, that the EWCAS administrative command organized the trip. The Sonnenbergs stipulated as to this fact, *see* Amended Pre-Trial Conference Order, Excerpt of Record (ER), exhibit 31, at 3. The record also amply supports the stipulation. *See id.* (stipulation that Nellis Base leased the van in which decedents travelled); Supplemental ER (SER), Roberts Depo. at 24 (Col. Roberts approved the

trip); *id.*, Weninger Depo. at 16 (head-and-head attachment should have set up the trip).

2. The Trip as a Benefit Accruing Because of Military Status

The district court found that the Disneyland trip was a benefit accruing to the decedents solely because of their military status. ER exhibit 48 at 5. The Sonnenbergs argue that the trip was open to civilians, or at least that the record is unclear as to whether the trip was restricted to military personnel.

Given the record, we cannot say that the district court's finding is clearly erroneous. Roberts testified that any trip participants would "have to have some relationship with the Department of Defense or with the [Electronic Warfare Close Air Support (EWCAS)] test itself." Supplemental ER (SER), Roberts Depo. at 44. Weninger testified that family members would not be allowed, and that he would have gone directly to Roberts to discuss the issue had he known that any family member meant to go on the trip. *Id.*, Weninger Depo. at 20. According to Sgt. Eggleston, only military personnel went on the trip. *Id.*, Eggleston Depo. at 40. In short, the district court could reasonably conclude that a de facto policy restricted the trip to service members.

3. Regulations Applicable to the Driver of the Van

The Sonnenbergs maintain that the decedents were not under military control during the length of the trip.

In support, they claim that the driver of the van was not subject to military regulations.

We disagree with the factual assertion that no regulations were applicable to the driver of the van. Concededly the van's driver was not a military driver supplied specifically to drive the van. Nevertheless, the van was leased by the Nellis Base. The leasing of such vans is permitted by regulations. Department of Defense Regulation 4500.36-R, 2-5(a), (e), SER tab 38, at 37-38. The regulations require a certain course of conduct from drivers involved in accidents. *Id.*, 10-1 to 10-5, *Id.* at 85-86. Other regulations require that the drivers of vehicles leased by the military employ specific safety driving practices. Appellee's Brief Appendix, Field Manual No. 21-305, Air Force Regulation 77-2, Chapter 8.

II. Applicability of the *Feres* Doctrine

In *Roush v. United States*, 752 F.2d 1460, 1464-65 (9th Cir. 1985), we held that for *Feres* to apply in a recreational context (1) the plaintiff must enjoy the recreational benefit solely by virtue of his military status; and (2) the plaintiff must be subject to direct military control during the recreation. As discussed previously, we uphold the district court's factual finding that the decedents in this case enjoyed this trip solely by virtue of their military status. The remaining issue is whether the decedents were under direct military control during the recreational activity.

We conclude that the decedents were under direct military control during their trip to Disneyland for two

reasons. First, the Disneyland trip was carefully controlled by the EWCAS command. The record reveals that the trip was organized to enhance the morale of TDY personnel. It is undisputed that TDY personnel were more closely monitored than permanent personnel. According to Weninger, the participants were required to sign up for the trip because it was necessary to "control where [TDY personnel were] . . . even on their weekends." SER, Weninger Depo. at 26. The trip participants were required to assemble in formation on their arrival to Disneyland and prior to leaving Disneyland. *Id.*, Eggleston Depo. at 41-42. It is also undisputed that several high-ranking non-commissioned officers were present on the trip. Appellant's Brief at 6. According to Weninger, the head-and-head detachment normally ensures that an officer or a senior-ranking non-commissioned officer is present on this type of activity. *Id.*, Weninger Depo. at 25.

Secondly, we think that *Bon v. United States*, 802 F.2d 1092 (9th Cir. 1986) compels the application of *Feres* to bar the Sonnenberg's action. In *Bon*, the plaintiff, a servicewoman acting off-duty, was injured when an off-duty service member struck her canoe with a motorboat. The plaintiff had rented the canoe from the military for recreational purposes. To hold that the plaintiff was subject to direct military control during her recreational activity, we relied on the fact that the use of the canoe was subject to government regulations. *Id.* at 1095. The regulations in *Bon* do not appear to be more specific than the ones we conclude above were applicable to the use of the van in this case. We therefore conclude that the decedents were under direct military control during their return trip to Nellis Base.

AFFIRMED.

Judge Reinhardt concurs on the ground that *Bon v. United States*, 802 F.2d 1092 (9th Cir. 1982) is controlling as to the return trip.

No. 90-539 (2)

In the Supreme Court of the United States

OCTOBER TERM, 1990

CAROLYN SONNENBURG, ET AL., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether *Feres* v. *United States*, 340 U.S. 135 (1950), as well as the decisions that have relied on it, should be overruled.

2. Whether the deaths of petitioners' decedents arose out of or occurred in the course of activity incident to service under the *Feres* doctrine.

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OCTOBER TERM, 1990

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UNITED STATES OF AMERICA

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 11a-16a) is unreported. The opinion of the district court (Pet. App. 1a-8a) is also unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 1, 1990. On August 6, 1990, Justice O'Connor extended the time for filing a petition for a writ of certiorari until October 1, 1990. The petition was filed on September 27, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Between August and November 1981, the United States Marine Corps, Army, and Air Force assembled personnel at Nellis Air Force Base in Las Vegas, Nevada, for a joint exercise to test, *inter alia*, the effectiveness of penetrating enemy defenses with aircraft or helicopters. Both permanent Electronic Warfare Close Air Support (EWCAS) team members and temporary duty personnel were involved in the exercise. Pet. App. 1a-2a.

The temporary duty personnel involved in the exercise were brought from their home stations, posts, or bases to perform specific duties and were given official orders to accomplish those tasks. Those personnel were housed, fed, and clothed by the military services and were subject to military discipline. They were not permitted to bring their families with them, nor were they allowed to bring any means of private transportation. Pet. App. 2a-3a.

To achieve and maintain high morale among the permanent team members and the temporary duty personnel, the military services organized many recreational activities for the servicemen, on and off the base. Those activities included a picnic, a softball game, and a trip to Hoover Dam. The servicemen were taken to the activities in military buses driven by temporary duty personnel. Pet. App. 3a.

In October 1981, the military services organized a trip to Disneyland as part of this recreational program. The trip was announced while the servicemen were in formation, and the sign-up sheet for the trip was placed in the orderly room of the compound. The military provided free transportation to and from Disneyland in a military bus and in a van leased by EWCAS. Only military personnel went on the trip. Pet. App. 3a-4a, 5a.

On the morning of October 31, 1981, the EWCAS personnel traveled to Disneyland and, upon arriving, got into

formation. Once in formation, a head count would have been taken and any appropriate orders issued, under standard operating procedure. At the end of the day, there was another formation. Pet. App. 4a. A senior non-commanding officer asked one of the temporary duty personnel, Sergeant Barnett, to drive the van back to the base. Sergeant Barnett agreed to do so and invited several of his friends—all of whom were also temporary duty personnel—to join him. Before the bus and the van arrived back at the base, the van went off the road and crashed. Four of the temporary duty personnel in the van were killed. Pet. App. 5a.

2. Survivors of three servicemembers who were killed filed this wrongful death action against the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C. 2401, 2671 *et seq.* The United States District Court for the Central District of California dismissed the action on jurisdictional grounds. The district court concluded that plaintiffs' claims were barred under *Feres* v. *United States*, 340 U.S. 135 (1950). Pet. App. 8a. The court reasoned that because the servicemen who were killed had access to recreational benefits, including the Disneyland trip, only because of their status as military personnel, their injuries were incident to military service. Pet. App. 7a. The court also found it significant that the Disneyland trip was sponsored by the military. *Ibid.*

On appeal, the Ninth Circuit also concluded that the Disneyland trip was incident to military service, and affirmed in an unpublished, unsigned opinion. Pet. App. 11a-16a. The court of appeals arrived at this result by applying the test it developed in *Roush* v. *United States*, 752 F.2d 1460 (9th Cir. 1985), for determining whether a recreational activity is incident to military service within the meaning of *Feres*. Under that test, *Feres* will apply in a recreational context if the plaintiff (1) enjoys the recrea-

tional benefit solely by virtue of his military status, and (2) was subject to military control during the recreation. *Id.* at 1464-1465.

Applying this test, the court of appeals concluded that the Disneyland trip was a benefit accruing to the decedents solely because of their military status, and that "the district court could reasonably conclude that a de facto policy restricted the trip to service members." Pet. App. 13a. The court of appeals also concluded that "the decedents were under direct military control during their trip to Disneyland." Pet. App. 14a. In support of this holding, the court noted that the trip was organized to enhance the morale of the temporary duty employees, the temporary duty personnel were more closely monitored during the trip than even the permanent team members, the trip participants were required to assemble in formation on arriving at Disneyland and before their departure, and several high-ranking non-commissioned officers were present on the trip. Pet. App. 15a. The court also noted that the EWCAS administrative command organized the trip (Pet. App. 12a), and found that the driver of the van was subject to military regulations, including special military safe-driving requirements. Pet. App. 14a.

ARGUMENT

The decision of the court of appeals is faithful to this Court's decisions applying the *Feres* doctrine and does not conflict with the decisions of any other court of appeals. Further review is therefore unwarranted.

1. Petitioners do not seriously contend that this action could go forward consistently with the *Feres* doctrine. Instead, their principal contention is that this Court should grant certiorari to overrule *Feres* and hold that service-members may bring suit under the FTCA for injuries that

arise out of or in the course of activity incident to service. This Court expressly reaffirmed the validity of the *Feres* doctrine less than four years ago in *United States* v. *Johnson*, 481 U.S. 681 (1987). Since that time, nothing has occurred to require yet another look at the doctrine. Therefore, considerations of *stare decisis*, as well as the rationales underlying *Feres* and its progeny, strongly support the continuing validity of the *Feres* doctrine.

"[A]ny departure from the doctrine of *stare decisis* demands special justification." *Patterson* v. *McLean Credit Union*, 109 S. Ct. 2363, 2370 (1989) (quoting *Arizona* v. *Rumsey*, 467 U.S. 203, 212 (1984)). Moreover, "the burden borne by the party advocating the abandonment of an established precedent is greater where the Court is asked to overrule a point of statutory construction." *Patterson*, 109 S. Ct. at 2370. "Considerations of *stare decisis* have special force in the area of statutory interpretation, for here, unlike in the context of constitutional interpretation, the legislative power is implicated, and Congress remains free to alter what we have done." *Ibid.* (citing *Square D Co.* v. *Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 424 (1986); *Illinois Brick Co.* v. *Illinois*, 431 U.S. 720, 736 (1977)).[1] Consequently, petitioners bear a heavy burden in arguing that *Feres* should be overruled. Petitioners cannot carry that burden because none of the "special justifications" recognized in *Patterson* is available here.

First, the arguments about whether *Feres* was decided correctly in light of the FTCA's language and history "were examined and discussed with great care" (*Patterson*,

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[1] See also *United States* v. *South Buffalo Ry.*, 333 U.S. 771, 774-775 (1948) ("[W]hen the questions are of statutory construction, not of constitutional import, Congress can rectify our mistake, if such it was, or change its policy at any time, and in these circumstances reversal is not readily to be made.").

109 S. Ct. at 2370) in *United States* v. *Johnson*, 481 U.S. 681 (1987). Four dissenting Justices in *Johnson* argued that *Feres* should be limited, essentially because in their view it was wrongly decided in the first place. 481 U.S. at 692. The majority, however, found that argument "unconvincing." *Id.* at 689 n.9. The majority noted that Congress has not acted to modify or set aside the *Feres* bar to suits "in the close to 40 years since it was articulated, even though, as the Court noted in *Feres*, Congress 'possesses a ready remedy' to alter a misinterpretation of its intent." 481 U.S. at 686. The majority explained (*ibid.*) that the Court "has never deviated" from holding that servicemembers may not sue the United States for injuries "that arise out of or are in the course of activity incident to service" (*Feres*, 340 U.S. at 146), and the Court "decline[d] to modify the doctrine at this late date." *Johnson*, 481 U.S. at 688.

For the Court to reconsider *Feres* now based on the same arguments as those rejected less than four years ago in *Johnson* would disserve the goal of maintaining a stable judicial system. The Court "is entrusted with the sensitive and difficult task of fashioning and preserving a jurisprudential system that is not based upon 'an arbitrary discretion.' " *Patterson*, 109 S. Ct. at 2370 (quoting The Federalist No. 78, at 471 (A. Hamilton) (C. Rossiter ed. 1961)). To reconsider *Feres* now would create uncertainty among those who rely on the Court's cases to guide their conduct. Only confusion and instability occur when a "well established" precedent such as *Feres* (see *Stencel Aero Engineering Corp.* v. *United States*, 431 U.S. 666, 670 (1977)) is overruled.

Second, the *Feres* doctrine has not proved to be "unworkable" or "inconsistent with the sense of justice or with the social welfare." *Patterson*, 109 S. Ct. at 2371. To the contrary, *Feres*'s "incident to service" test has provided a

simple rule of decision that the government and the lower courts have been able to apply with relative ease. See, *e.g.*, *United States* v. *Stanley*, 483 U.S. 669, 683 (1987) (adopting "incident to service" test for determining *Bivens* liability in servicemember suits against federal officials because, among other reasons, the test "provides a line that is relatively clear"). For example, in the 40 years since *Feres* was decided, only a handful of *Feres* cases have made their way to the Court. Only three cases concerned application of the test,[2] and even those cases represent essentially the kind of fine-tuning any legal doctrine requires from time to time.[3]

Finally, *Feres* is not incompatible with the law as it has developed in other areas. Cf. *Patterson*, 109 S. Ct. at 2371. Indeed, *Feres* has been woven into the fabric of the law in a number of respects. For example, the Court has

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[2] See *United States* v. *Johnson*, 481 U.S. 681 (1987) (*Feres* bars FTCA claim by servicemember's estate for injuries caused by civilian employees of the government); *United States* v. *Shearer*, 473 U.S. 52 (1985) (*Feres* bars FTCA action brought by estate of serviceman who was murdered by another serviceman while off duty and off the military base); *United States* v. *Brown*, 348 U.S. 110 (1954) (*Feres* does not bar FTCA claims by discharged servicemen for post-discharge injuries).

[3] Aside from the three cases cited in note 2, *supra*, this Court's remaining *Feres* cases concerned whether the "incident to service" test should be used to bar non-FTCA actions against the United States. See *United States* v. *Stanley*, 483 U.S. 669 (1987) (*Feres* extended to bar *Bivens* claims by servicemen); *Chappell* v. *Wallace*, 462 U.S. 296 (1983) (same); *Stencel Aero Engineering Corp.* v. *United States*, 431 U.S. 666 (1977) (*Feres* bars indemnification action against United States for damages paid by third party to serviceman injured in course of military service); *United States* v. *Muniz*, 374 U.S. 150 (1963) (*Feres* not extended to bar FTCA suits by federal prisoners for injuries in federal prison resulting from negligence of government employees).

adopted the *Feres* test to determine the circumstances under which servicemembers may sue a federal official for violations of constitutional rights. *Stanley*, 483 U.S. at 684. *Feres* also has been held to bar indemnification actions against the United States for damages paid by third parties to servicemen who are injured in the course of duty. See *Stencel Aero Engineering Corp.* v. *United States*, 431 U.S. 666 (1977). And lower federal courts have adopted the "incident to service" rule in holding that no tort claim lies against the United States for the death or injury of a foreign serviceman arising out of service-related activities. See *Daberkow* v. *United States*, 581 F.2d 785 (9th Cir. 1978). To overrule *Feres* now would be to undermine settled precedents in a number of related areas of the law.

2. The policies underlying *Feres* remain valid. To begin, allowing service members to sue the military for service-connected injuries could have a severe impact on military discipline, morale, and control. Soldiers are trained to obey their superiors, not sue them. Suits by soldiers raising issues of military discipline would disrupt the " 'peculiar and special relationship of the soldier to his superiors' that might result if the solder were allowed to hale his superiors into court." *Chappell* v. *Wallace*, 462 U.S. 296, 304 (1983) (quoting *Stencel Aero Engineering Corp.* v. *United States*, 431 U.S. 666, 676 (1977) (Marshall, J., dissenting)). The military is a special society, and the relationship between the government and members of its armed forces is "distinctively federal in character." *Johnson*, 481 U.S. at 689 (quoting *Feres*, 340 U.S. at 143, and *United States* v. *Standard Oil Co.*, 332 U.S. 301, 305 (1947)). As the Court explained in an early case:

> An army is not a deliberative body. It is the executive arm. Its law is that of obedience. No question can be

> left open as to the right to command in the officer, or the duty of obedience in the soldier. Vigor and efficiency on the part of the officer and confidence among the soldiers in one another, are impaired if any question be left open as to their attitude to each other.

In re Grimley, 137 U.S. 147, 153 (1890); accord *Chappell* v. *Wallace*, 462 U.S. at 300 ("centuries of experience have developed a hierarchical structure of discipline and obedience to command, unique in its application to the military establishment and wholly different from civilian patterns.").[4]

Allowing servicemembers to bring FTCA suits for service-related injuries also would undermine the commitment to duty that the military services require. As this Court wrote in *Johnson*, "military discipline involves not only obedience to orders, but more generally duty and loyalty to one's service and to one's country. Suits brought by service members against the Government for service-related injuries could undermine the commitment essential to effective service and thus have the potential to disrupt military discipline in the broadest sense of the word." 481 U.S. at 691.

The existence of "generous statutory disability and death benefits" for servicemembers and their families is an additional, and independent, reason supporting *Feres*. See *Johnson*, 481 U.S. at 689. Under the Veterans' Benefits Act, 38 U.S.C. 301 *et seq.* – a statute that has been amend-

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[4] Moreover, if *Feres* were overruled, the military would be confronted with "compelled depositions and trial testimony by military officers concerning the details of their military commands." See *United States* v. *Stanley*, 483 U.S. at 682-683. Requiring the military to respond to FTCA suits by servicemembers for injuries arising out of service-connected activities would drain military resources and would divert military personnel from their primary task of defending the nation.

ed a number of times since *Feres*—"[t]hose injured during the course of activity incident to service not only receive benefits that 'compare extremely favorably with those provided by most workmen's compensation statutes,' * * * but the recovery of benefits is 'swift [and] efficient,' * * * normally requir[ing] no litigation." *Johnson*, 481 U.S. at 690. It is "difficult to believe that Congress would have provided such a comprehensive system of benefits while at the same time contemplating recovery for service-related injuries under the FTCA." *Ibid.* In light of the generous no-fault compensation scheme Congress designed for injured servicemembers, it is difficult to attack the *Feres* doctrine as unfair.

Indeed, one commentator has observed that the Veterans' Benefits Act is "so broad that it more closely resembles a universal health and disability insurance policy than ordinary workmen's compensation." Bernott, *Fairness and* Feres*: A Critique of the Presumption of Injustice*, 44 Wash. & Lee L. Rev. 51, 63 (1987). This commentator explains:

> Unlike the compensation scheme for nonmilitary federal employees, the Federal Employees Compensation Act (FECA), the military scheme provides benefits for substantially *all* disabilities or injuries sustained or aggravated during a serviceman's federal service. There is no scope of employment test; thus no standard claimant's burden of proof of employment-connection; there is not even a typical adversary claims process. Barring his own willful misconduct that results in disability, the government compensates the serviceman for whatever physical adversity affects or befalls him so long as he is a member of the military.

Id. at 63-64 (footnotes omitted). Thus, to overrule or narrow *Feres* would merely broaden "the already fuller access

to federal compensation that servicemen enjoy over and above other federal employees." *Id.* at 65.

3. The court of appeals correctly applied the *Feres* doctrine to the facts of this case. Military personnel organized the trip at issue here to maintain high morale on the part of temporary duty employees during an intensive warfare training exercise, and the employees who went on the trip remained under military discipline and control during the entire trip. In holding that the *Feres* doctrine bars this action, the courts below simply followed the many other decisions that have consistently applied *Feres* to bar FTCA claims by servicemembers in analogous cases. See, *e.g.*, *Walls* v. *United States*, 832 F.2d 93 (7th Cir. 1987) (airplane crash during recreational flying); *Millang* v. *United States*, 817 F.2d 533 (9th Cir. 1987) (auto accident during picnic), cert. denied, 485 U.S. 987 (1988); *Bon* v. *United States*, 802 F.2d 1092 (9th Cir. 1986) (boat accident); *Woodside* v. *United States*, 606 F.2d 134 (6th Cir. 1979) (airplane crash during recreational flying), cert. denied, 445 U.S. 904 (1980); *Hass* v. *United States*, 518 F.2d 1138 (4th Cir. 1975) (riding horses at a stable owned and operated by the military); *Chambers* v. *United States*, 357 F.2d 224 (8th Cir. 1966) (swimming in pool at air base). In any event, further review would not be warranted to determine whether the court of appeals erred in applying settled legal doctrine to the facts of this case.

CONCLUSION

For the above reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 90-539

IN THE

Supreme Court of the United States

October Term, 1990

CAROLYN SONNENBERG, GORDON SONNENBERG, MARY CARHOUN McCORMICK, JEFF CARHOUN SCOTT CARHOUN, GERRY CARROLL, KATHERINE CARROLL, CHRISTOPHER CARROLL,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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No. 90-539

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1990

CAROLYN SONNENBERG, GORDON SONNENBERG, MARY CARHOUN McCORMICK, JEFF CARHOUN SCOTT CARHOUN, GERRY CARROLL, KATHERINE CARROLL, CHRISTOPHER CARROLL,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICI CURIAE ASSOCIATION OF TRIAL LAWYERS OF AMERICA AND CONCERNED AMERICANS FOR MILITARY IMPROVEMENT IN SUPPORT OF PETITIONERS

IDENTITY AND INTEREST OF AMICI CURIAE

This amicus curiae brief supports the position of Petitioner. Letters from all parties to this action granting their consent to the filing of this brief are on file with the Clerk of this Court.

The Association of Trial Lawyers of America [ATLA] is a voluntary bar association of approximately 65,000 trial attorneys from across the country. ATLA members primarily represent injured victims of tortious conduct, as well as plaintiffs in civil rights actions and criminal defendants. ATLA members frequently represent members of the Armed Services and their families in their efforts to obtain civil redress for injury. Many ATLA members, particularly those active in ATLA's Military Law Section, are themselves members of the Armed Services and are familiar with the special legal problems faced by servicemembers.

ATLA believes that the right to seek just compensation for negligently or wrongfully inflicted injury is a fundamental element of our civil justice system. The fact that servicemembers are deprived of a remedy for governmental negligence which is afforded other citizens is a grave inequity. The fact that many servicemembers are presently called upon to make the ultimate sacrifice for their country heightens the need to ensure their fair treatment under the law. ATLA believes that its analysis of the *Feres* doctrine and its rationale will assist this Court in its assessing the merits of the Petition.

Concerned Americans for Military Improvement [CAMI] is a nationwide, nonpartisan, non-profit organization dedicated to improving the rights, benefits, and entitlements of members of the Armed Forces of the United States as well as their spouses, children, and heirs. CAMI is actively involved in efforts to persuade Congress to amend the Federal Tort Claims Act to permit active duty servicemembers and their families to maintain actions for medical malpractice. In addition, CAMI participated as amicus curiae in *Cortez v. United States*, 854 F.2d 723 (5th Cir. 1988), opposing the extension of the *Feres* doctrine to bar medical malpractice claims by individuals on the Temporary Disability Retirement List of the Armed Forces.

CAMI has a particular interest in this case because the rights of servicemembers under the FTCA will be directly affected by this Court's action with respect to the *Feres* doctrine.

REASONS FOR GRANTING THE WRIT

1. THE *FERES* DOCTRINE IS UNSOUND AS A MATTER OF MILTARY POLICY AND LAW.

When it enacted the Federal Tort Claims Act [FTCA], Congress eliminated most of the sovereign immunity of the United States. *United States v. Johnson*, 481 U.S. 681, 692 (1987)(Scalia, J. dissenting). In clear language, Congress created a remedy for individuals injured by the negligence of a government employee acting within the scope of his or her employment. Congress provided twelve exceptions to the general waiver of immunity. 28 U.S.C. §2680. If one or more of the exceptions applies, recovery is barred. *Id.*

Despite the statute's clear language, the Court created a thirteenth exception to the FTCA. This exception, which has become known as the *Feres* doctrine, bars recovery by members of the armed forces for injuries arising out of or incident to their military service. *Feres v. United States*, 340 U.S. 135 (1950). Although in *United States v. Johnson*, 481 U.S. 681 (1987) a bare majority of the Court indicated in dictum its support for the *Feres* doctrine, the fact remains that during the four decades following its establishment, the Court has never subjected the *Feres* doctrine to a critical analysis and review.

In *United States v. Johnson*, 481 U.S. 691 (1987), the

Court emphasized that three broad rationales support the *Feres* doctrine:

> (1) The distinctively federal nature of the relationship between the government and its servicemembers. (The Federal Relationship/ Uniformity Rationale);
>
> (2) The existence of disability and death benefits (Veterans' Benefits Rationale); and
>
> (3) The fear that negligence actions by servicemembers would require judicial involvement in sensitive military affairs at the expense of military discipline (Military Discipline Rationale).

Id. at 688-90.

Amici contend that none of these bases for the *Feres* doctrine can withstand critical analysis. This contention is based on the results of research into the factors which motivate men and women in combat. It is also premised on scholarly and judicial criticism of the *Feres* doctrine and on the plain language of the FTCA.

Amici urge this Court to overrule the *Feres* doctrine. Alternatively, the Court should limit its scope so that it does not bar the claims of servicemembers arising from off-duty activities or recreational accidents. Further, the *Feres* doctrine should not bar a servicemember's medical malpractice claim which arises from pregnancy, elective surgery, or self-referral for treatment.

A. PRESERVATION OF MILITARY DISCIPLINE DOES NOT JUSTIFY BARRING SERVICEMEMBERS FROM RECOVERY UNDER THE FTCA.

1. High Morale, Not Discipline, Is The Factor Which Is Critical To Ensuring The Successful And Efficient Functioning Of The Armed Services.

The Military Discipline rationale was not one of the foundations for the doctrine set forth in *Feres v. United States*, 340 U.S. 135 (1950). Perhaps sensing the inherent flaws in the first two *Feres* rationales, the Court later articulated the Military Discipline Rationale as the best support for the doctrine. *United States v. Brown*, 348 U.S. 110, 112 (1954); *United States v. Shearer*, 473 U.S. 52, 57 (1985); *Chappel v. Wallace*, 462 U.S. 296, 299 (1983); *United States v. Muniz*, 374 U.S. 150, 162 (1963). *Brown* explained that the Military Discipline Rationale was based on a fear that FTCA suits by service personnel may have an adverse impact on military discipline. 348 U.S. at 112. In reality, this rationale is the weakest and most erroneous of the *Feres* rationales.

The inherent error and theoretical weakness of the Military Discipline Rationale are reflected in the attempts of lower courts to justify and defend it. Some have stated that suits by service personnel would erode the security and defense of the country. *See, e.g., Jaffee v. United States,* 592 F.2d 712, 717 (3rd Cir. 1979). Others have indicated that "it is the suit, not the recovery, that would be disruptive of military discipline." *Henninger v. United States,* 473 F.2d 814, 815 (5th Cir. 1973). Significantly, these explanations are presented as self-evident, without evidence or logic to support them. Nor have those commentators who approve of *Feres* offered any evidence to support the Discipline Rationale beyond citation to prior decisions. *See, e.g.*, Note, *Why Congress Should Not Legislatively Repeal the Feres Doctrine - A Struggle in Equity,* 18 Tex. Tech. L. Rev. 819 (1987); Note, *In Support of the Feres Doctrine and a Better Definition of "Incidence to Service",* 56 St. John's L. Rev. 485 (1982).

These pronouncements purport to advance a theory that it is coercion which motivates service personnel. This is the kind of conjecture which this Court rejected in *Muniz*, 374 U.S. at 161 (problems of prison administration caused by FTCA suits are "more a matter of conjecture than reality").

Even at the time *Feres* was decided, overwhelming evidence existed which refuted the premise of the Discipline Rationale. This evidence was the fruit of the research of the Army's historical teams during the Second World War. Their interviews of thousands of soldiers fresh from combat represent the first systematic attempt to study human behavior in combat situations. J. Keegan, The Face of Battle 70-71 (1976).

This research produces some startling findings. Most important is that soldiers in combat do not view themselves as part of a hierarchical military organization. Rather, they see themselves as rough equals within small groups of six or seven. Keegan, at 51.

Both General S.L.A. Marshall and Samuel Stouffer have relied on these studies in their seminal works on armies in combat. General Marshall concluded that an army is a social mechanism which is governed by its own laws, customs, and mores. Accordingly, discipline imposed from above is of limited utility in motivating men to fight. Consequently, General Marshall argued that an army should strive to forge and nurture close bonds of friendship which are centered on an individual who is identified as a "natural fighter." Such relationships will ensure that no one shrinks or runs away from battle. S. Marshall, Men Against Fire (1947).

Stouffer reached an almost identical conclusion. He

found that 39% of enlisted men surveyed reported that they were motivated by a desire to end the task. Group solidarity was cited by 14% of enlisted personnel and 15% of officers. Only 1% of enlisted men cited discipline as a motivating factor. S. Stouffer, The American Soldier: Combat and Its Aftermath 108-09 (1949).

Both officers and enlisted men, however, recognized the importance of strong personal relationships between officers and enlisted personnel. Each group also recognized that an officer's sincere concern for his men was a key component of successful leadership. Ninety-seven percent of the officers believed that a personal concern for the individual welfare of their men was "absolutely necessary." 2 S. Stouffer, Suchman, L. DeVinney, S. Star & R. Williams, Jr., The American Soldier: Adjustment During Army Life 385-88 (1949).

Like General Marshall, Stouffer concluded that it was the personal relationship between members of a combat team which was the crucial factor in battle; formal discipline played little, if any, role in the effective functioning of a combat team. *Id.* at 127. *See also*, J. Baynes, Morale: A Study of Men and Courage 253-545 (1967)(listing the factors which created high morale and performance of the 2nd Scottish Rifles in the Battle of Neuve Chappelle, March 9-15, 1915).

Research conducted during the Korean and Vietnam actions confirmed these conclusions. The desire to "get it over and to return home" and identification with a small group were primary motivations of soldiers under fire. This research produced no evidence that "the traditional structure of military discipline contributes to combat effectiveness." D. Cortright, Soldiers in Revolt 225 (1975).

Though a soldier's identification with his friends was

often at odds with military authorities, it contributed to combat effectiveness. Little, *Buddy Relations and Combat Performance*, in The New Military Changing Patterns of Organizations 195 (M. Janowitz, ed. 1964). Rigid discipline actually erodes morale, loyalty, and efficiency. *Id.* at 225-26. Similar conclusions have been reached concerning the motivation of ancient Greek armies. *See generally,* V. Hanson, The Western Way of War: Infantry Battle in Classical Greece (1989). "In the last analysis," a leading military theorist has stated, "success in battle is a matter of morale." Ardant Du Picq, Battle Studies: Ancient and Modern Battle (1946).

Significantly, the keen emphasis by some courts on the importance of military discipline is not reflected in military doctrine or law. For example, neither military doctrine nor law demands unquestioning obedience to orders. Both require servicemembers to ignore or disobey illegal orders. *United States v. Calley,* 22 C.M.A. 534, 48 C.M.R. 19 (1973); *see generally,* R. Rivkin, The Rights of Servicemen 105 (1987); J. Tomes, The Servicemember's Legal Guide 24-25 (1987).

Additionally, Army doctrine recognizes the value of initiative, rather than blind obedience:

> [Initiative] requires a willingness and ability to act independently within the framework of the higher commander's intent . . . [I]nitiative requires audacity which may involve risk-taking and an atmosphere which supports it. . . . In the chaos of battle, it is essential to decentralize decision authority to the lowest practical level because overcentralization slows action and leads to inertia. . . . Decentralization demands subordinates who are willing and able to take risks and superiors who nurture that willingness and ability in their

subordinates.

Department of the Army Field Manual 1005, *Operations* (May 1986) at 15.

Indeed, the power of modern weaponry and the vulnerability of communications systems during battle have made decentralization and initiative, rather than blind obedience to orders, a key operational concept for modern armies. *Id.* One scholar has stated:

> Decentralization of tactical control forced on land forces has been one of the most significant features of modern war. In the confused and often chaotic battlefield environments of today, only the smallest of groups are likely to keep together, particularly during crucial movements. . . . Small groups and their leaders must be capable of going it alone . . .

J. English, A Perspective on Infantry 282-83 (1981). The United States Army has responded to these studies by reorganizing its structure to take advantage of the dynamics and friendships of small groups. J. Keegan, The Face of Battle 51 (1976).

Morale, the Army recognizes, is the glue which binds such groups together into cohesive military units.

> Cohesion results from the respect, confidence, *caring* and communication that binds members of a unit together - mentally, emotionally and spiritually. The level of cohesion depends upon how well the unit can work as a smoothly functioning team to accomplish all missions in peace or war.

Department of the Army Field Manual 22-100, *Military*

Leadership (Oct. 1983), at 156. (Emphasis added). A soldier's courage and will under stress will be strengthened by the belief that his leaders and peers will try "to help him because they care for him." *Id.*

An important element of caring is remedial action to redress wrongs. For example, a leader is required to apologize to a soldier he or she has wronged. *Id.* at 279-82. Similarly, the government should be obligated to compensate, fully and fairly, soldiers injured by its negligence.

The *Feres* doctrine obviously undermines the military's goal of fostering high morale and cohesiveness among servicemembers. What is the impact on servicemembers of the judicial announcement that they are excluded from the full benefits of the system of justice they are willing to fight for? In his dissent in *Johnson*, Justice Scalia provided the clear answer:

> After all, the morale of Lieutenant Commander Johnson's comrades-in-arms will not likely be boosted by news that his widow and children will receive only a fraction of the payment that they might have recovered had he been piloting a commercial helicopter at the time of his death.

481 U.S. at 700.

2. Suits By Servicemembers Do Not Undermine Military Discipline Nor Involve The Judiciary In Sensitive Areas.

Despite the fact that their lawsuits are frequently dismissed, servicemembers continue to press claims for relief under the FTCA. *See* Zillman, *Intramilitary Tort Law: Incidence to Service Meets Constitutional Tort*, 60 N.C.L. Rev. 489, 511 nn. 129 & 130 (1982)(of 147 *Feres* cases

decided between 1955 and 1981, only eight were decided in the plaintiff's favor); Note, *United States v. Stanley: Has the Supreme Court Gone a Step Too Far?*, 90 W. Va. L. Rev. 473 (1987)(in 81 cases during 1981-87, only eight plaintiffs prevailed). Servicemembers have also brought suit under other statutes, such as the Privacy Act, 5 U.S.C. §552(a).

One commentator has observed:

> [T]here is no evidence that negligence actions by servicemembers over the past twenty-five years have degraded the military mission.
>
> The military soldier has also been litigious in other areas. Although this litigation has not been particularly productive for the plaintiffs, servicemembers have vigorously asserted their positions in direct court actions against high ranking officials. The proliferation of this constitutional litigation has apparently not interfered substantially with military operations.

Rhodes, *The Feres Doctrine After Twenty-Five Years*, 18 A.F.L. Rev. 24, 42 (1976). The government has never produced evidence that an FTCA suit has affected military discipline. *See* Bennett, *The Feres Doctrine, Discipline and the Weapons of War*, 29 St. Louis U.L.J. 383 (1985). In fact, the services report that discipline is at an all-time high. See, "The Military's New Stars," *U.S. News & World Rep.* (April 18, 1988) at p. 32.

Nor does the available evidence suggest that FTCA suits by service personnel would precipitate a flood of litigation which would embroil the judiciary in sensitive military matters.

Although a servicemember continues to serve after

retirement and his or her treatment at a military medical facility is deemed incident to that service, *McCarty v. McCarty*, 453 U.S. 210, 221-22 (1981), the *Feres* doctrine has never barred FTCA suits by retired service personnel for medical malpractice by government employees. *See, e.g., Watt v. United States*, 246 F. Supp. 386, 388 (E.D.N.Y. 1965). It appears that the armed forces settle most meritorious claims quickly, fairly, and efficiently at the administrative level. *See* H.R. Rep. No. B, accompanying H.R. 536 (June 15, 1989), 101st Cong., 1st Sess. at 8. ("During fiscal years 1984-1988, the government paid about $60 million per year in malpractice settlements to dependents and retirees.") None of the concerns expressed by the Court in *Feres* and *Johnson* have materialized. There is no reason to believe that the result would be different in cases which *Feres* currently bars.

B. THE AVAILABILITY OF BENEFITS UNDER THE VETERANS BENEFITS ACT DOES NOT JUSTIFY THE *FERES* DOCTRINE.

In *Feres*, the Court found that Congress' provision for compensation under the Veterans' Benefit Act, 72 Stat. 1118, as amended 38 U.S.C. § 301 [VBA], to servicemen killed or injured in the line of duty, in the absence of an express provision to adjust for dual recoveries under the VBA and the FTCA, indicated that Congress did not foresee FTCA recovery by servicemembers. 340 U.S. at 144. The continued vitality of this Veterans' Benefits Rationale is not entirely clear. *Compare United States v. Johnson*, 481 U.S. at 689-90 (citing Rationale) with *United States v. Shearer*, 473 U.S. 52, 58 n.4 (1985)(indicating that this rationale is "no longer controlling") In any event, Amici suggest that the Veterans' Benefits Rationale does not support the continued existence of the *Feres* doctrine.

Congress was not obliged in provide an express

mechanism to avoid dual recovery under VBA and the FTCA. The FTCA makes the United States liable for the negligence of its employees "to the same extent as a private individual under like circumstances." 28 U.S.C. §2674. At the time of enactment, it was well settled that payments made by a tortfeasor to an injured party may be shown in mitigation or reduction of recovery. *See, e.g., Southwestern Brewery & Ice Co. v. Schmidt,* 226 U.S. 162 (1912).

In *Brooks v. United States,* 337 U.S. 49 (1949), the Court permitted two servicemen who were injured in an off-duty accident caused by a government employee to recover under the FTCA. The Court stressed that "nothing in the Torts Claim Act or the veterans laws . . . provides for exclusiveness of remedy." 373 U.S. at 53 Moreover, the Court observed that while the FTCA contained three exclusive provisions, 28 U.S.C. §§ 2672, 2676, and 2679, the Act is silent with respect to servicemembers as plaintiffs. *Id.* The Brooks Court indicated that VBA compensation would be offset against any FTCA recovery awarded a servicemember. *Id.* at 53-54. Upon remand, the Fourth Circuit ordered such an offset or adjustment. *Brooks v. United States,* 176 F.2d 482 (4th Cir. 1949). This result complies with the language of section 2674.

Moreover, the Veterans' Benefit Rationale proves too much. VBA benefits are not limited to injuries that are "incident to service." 38 U.S.C. §105. Yet the *Feres* bars only such claims.

Finally, the benefits that VBA provides are a grossly inadequate substitute for full recovery in tort. *See* Howland, *The Hands-Off Policy and Intramilitary Torts,* 71 Iowa L. Rev. 92, 133-37 (1985). The existence of veterans' benefits may salve society's conscience and make the *Feres* doctrine more palatable, *Hunt v. United States,* 636 F.2d 580, 598

(D.C. Cir. 1980). However, the availability of such partial, conditional alternative benefits does not justify depriving servicemembers of congressionally provided rights under the FTCA.

C. THE FEDERAL RELATIONSHIP/UNIFORMITY RATIONALE DOES NOT JUSTIFY THE *FERES* DOCTRINE.

The original stated purpose of the Federal Relationship/Uniformity Rationale was to protect servicemembers who are unable to control their places of assignment from the vagaries of local law. Accordingly, the Court explained that Congress had substituted the certainty of recovery under the Veterans Benefits Acts for the possibility of nonuniform state court judgments. *Feres v. United States*, 340 U.S. 135, 140 (1950). Twenty-seven years later, the Court subtly shifted the emphasis of this rationale.

In *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666 (1977), the Court explained the Federal Relationship/Uniformity Rationale by stating that "as the Court held in *Feres* it makes no sense to permit the fortuity of the situs of the alleged negligence to affect the liability of the Government to a servicemember who sustains service-connected injuries." *Id.* at 672.

Again the rationale offered in support of *Feres* proves too much. The relationship between the Government and a servicemember does not lose its distinctively federal nature when he or she suffers an injury that is *not* incident to service. Nor is local law any more uniform. Yet recovery is permitted for such injuries. *See, e.g., Brooks v. United States*, 337 U.S. 49 (1949); *Harvey v. United States*, 884 F.2d 854 (5th Cir. 1989).

Additionally, there is no reason to believe that the military's need for uniformity in this area is any different or superior to that of other federal agencies which have "unique nationwide functions." *Stencel Aero Engineering Corp. v. United States*, 431 U.S. 666, 675 (1977)(Marshall, J., dissenting). Yet all other federal agencies are subject to negligence suits by citizens, the outcomes of which are dictated by the vagaries of local law. *Id.* The military itself is subject to suit suits by civilians. *See, e.g., Indian Towing Co. v. United States*, 350 U.S. 61 (1955).

Finally, this Court has itself recognized the logical bankruptcy of the Federal Relationship/Uniformity Rationale. In *United States v. Muniz*, 374 U.S. 150 (1963), the Court permitted federal prisoners, who have even less control over their geographical location, to recover under the FTCA. The Court concluded that any problems of prison administration due to nonuniform recoveries "were more a matter of conjecture than reality." *Id.* at 161. At any rate, nonuniform recoveries could not be more prejudicial to the prisoners than uniform nonrecovery. *Id.* at 162.

The law has thus arrived at a cruel anomaly. Those who dedicate and risk their lives in the defense of America, its Constitution and its laws are deprived of those rights under the FTCA which are afforded even to those who have been convicted of violating and subverting the law. Amici respectfully suggest that granting the petition for certiorari in this case would afford this Court the opportunity to remove this anomaly by overruling the *Feres* doctrine or limiting its scope.

II. THE ALMOST UNIVERSAL CRITICISM AND CONDEMNATION OF THE *FERES* DOCTRINE WARRANT REEXAMINATION OF THE DOCTRINE BY THIS COURT.

From its inception to the present time, the *Feres* doctrine has been subject to vigorous criticism and condemnation by scholars, practicing attorneys, and courts. *See United States v. Johnson*, 481 U.S. 691, 701 (Scalia, J., dissenting)(collecting authorities). Its recent extension in *Johnson* has served only to increase this criticism. *See* Petition for Certiorari at 10-11 (collecting authorities).

One observer has expressed the view that the *Feres* decision was motivated by the political pressures prevailing during the Korean War. DeDominicis, *Atomic Vets Take Their Case to Court*, 2 Cal. Law. 28, 31 (1982). DeDominicis' thesis may not be too wide of the mark. It is now known that the Court's decision in *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952), was influenced by public opinion. *See* W. Rehnquist, The Supreme Court: How It Was, How It Is 95 (1987).

Some of the strongest criticism of the doctrine takes the form of illustrating its bizarre results. *See In Re "Agent Orange" Product Liability Litigation*, 580 F. Supp. 1242, 1252 (E.D.N.Y. 1984)(hypothetical demonstrating the disparity of results in claims arising out of the same factual situation).

The outcomes of actual cases are no less perplexing. For example, *Feres* barred a serviceman's claim for negligence arising out of the crash of a military aircraft into his on-post home. *Orken v. United States*, 239 F.2d 850 (6th Cir. 1956). However, the doctrine did not bar a serviceman's claim for negligence arising out of the crash of a military aircraft into his off-post home. *Sapp v. United States*, 153 F. Supp. 496 (W.D. La. 1957). *See also United Airlines v. Wiener*, 335 F.2d 379, 404 (9th Cir.), cert. dism., 379 U.S. 951 (1964)(civilian passengers on an airliner which was negligently struck by an Air Force plane could recover

under the FTCA, but servicemember passengers could not).

The persistence of the *Feres* doctrine in the face of such inequitable results and the well-founded criticisms of the overwhelming majority of commentators undermines the public confidence in the fundamental fairness of the law. This Court has not hesitated to overrule its own precedents when "history and experience have conspicuously eroded" their foundation. *See, e.g., United States v. Reliable Transfer Co.*, 420 U.S. 397, 410-11 (1975); *Executive Jet Aircraft, Inc. v. City of Cleveland*, 409 U.S. 249, 266-68 (1972); *Trammel v. United States*, 445 U.S. 40, 51-53 (1980).

III. THE FACT THAT CONGRESS HAS NOT OVERTURNED THE *FERES* DOCTRINE SHOULD NOT PRECLUDE ITS REEXAMINATION BY THIS COURT.

Congressional silence concerning the *Feres* doctrine, while unfortunate, hardly provides a sound basis for continuing this harsh rule. Inaction simply sheds no light on legislative intent. This Court has acknowledged that "we walk on quicksand when we try to find in the absence of corrective legislation a controlling legal principle." *Helvering v. Hallock*, 309 U.S. 106, 121 (1940). Moreover, the *Feres* doctrine is, after all, a judicial, not legislative creation. "It would require very persuasive circumstances enveloping Congressional silence to debar this Court from re-examining its own doctrines." *Id.* at 119.

The fact is that Congress has enumerated the exceptions to the FTCA. In engrafting an additional exception onto the Act, the Court has introduced needless complexity and inequity into Congress' provisions for compensation of citizens injured by the negligence of government employees. Surely the task of rectifying the inequitable treatment of servicemembers under the Act

does not fall solely to the Congress.

Servicemembers and their families sacrifice much for their country and ask little in return. Petitioners in this case seek no special treatment due to their military status. They seek only the same right to seek compensation for the negligence of a governmental employee that is afforded all other citizens. Indeed, this case presents a particularly stark demonstration of the inequity of the *Feres* doctrine. It was purely fortuitous that civilians were not injured or killed in the vehicular accident which took the lives of decedents. Those civilians or their families would have been entitled to maintain an action under the FTCA, while petitioners' actions were barred. Moreover, none of the rationales advanced in support of the *Feres* doctrine justifies this discrimination under such circumstances.

Amici urge this Court to end the treatment of servicemembers as second-class citizens by overruling *Feres*. Alternatively, this Court should limit the scope of *Feres* to bar only suits for on-duty injuries arising from the mission essential operations of the Armed Forces. It should exclude from the scope of *Feres* suits for injuries arising from off-duty accidents, recreational accidents, and medical malpractice in connection with self-referral or elective procedures.

CONCLUSION

For these reasons, amici urge this Court to grant the Petition for a Writ of Certiorari in this case.

Respectfully submitted,

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